

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PAUL B. TALIAFERRO

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION)

DOCKET NUMBER
DC075281F1134

OPINION AND ORDER

Paul B. Taliaferro (appellant) petitioned the Board's Washington, D.C. Regional Office for appeal of the action of the Department of Transportation's Federal Aviation Administration (agency) removing him from his GS-14 position as an Air Traffic Control Specialist at the Washington Air Route Traffic Control Center, Leesburg, Virginia. The removal action was based on two charges: (1) participation in a strike against the United States Government in violation of 5 U.S.C. §7311 and 18 U.S.C. §1918; and (2) unauthorized absence. Both charges stemmed from appellant's failure to report to duty from 7:00 a.m. to 3:00 p.m. on August 5, 1981.^{1/}

^{1/} The Board has since taken official notice of the fact that a strike by members of the Professional Air Traffic Controllers Organization (PATCO) against the Federal Government began on August 3, 1981, and continued at least through August 6, 1981, and found that such strike was illegal. Ketchum v. Department of Transportation, MSPB Docket No. DA075281F713 at 9 (May 28, 1982), motion for clarification denied (November 23, 1982).

Appellant alleged in his petition for appeal that the agency erred in not providing him a full seven days to respond to the proposed removal, that the agency failed to prove the charges by a preponderance of the evidence, that the agency failed to maintain him in a duty status during the notice period, and that the agency committed numerous other procedural errors.^{2/}

In an initial decision, issued November 30, 1982, the presiding official found the agency established a prima facie case of strike participation and that appellant failed to rebut this prima facie case; that the charges were supported by preponderant evidence; that appellant failed to show harmful error when he was given less than seven days to reply to the proposed removal; that the deciding official did have independent decision-making authority; and that appellant failed to show harmful error on the numerous procedural points raised. The presiding official also found that the agency improperly failed to maintain appellant in a nonduty with pay status during the notice period. The presiding official sustained the agency action but ordered the agency to retroactively correct its records to show appellant in a nonduty with pay status during the notice period.

^{2/} More specifically, appellant claimed that: the proposing/deciding official had no independent decision-making authority; the agency failed to consider the imposition of a lesser penalty; the agency committed harmful error by refusing to grant him an extension of time within which to reply to the notice of proposed removal and its invocation of a shortened notice period; and the penalty of removal was the result of disparate treatment since employees who were AWOL and on strike did not receive any discipline if they returned to work, while employees engaged in the same conduct but who failed to meet their "deadline shift" were removed.

Appellant has now filed a petition for review of the initial decision, and the agency has filed a response in opposition to the petition. Additionally, the agency filed a petition for review seeking reversal of the presiding official's finding that the agency should have retained appellant in a nonduty with pay status during the notice period. We shall consider each of the arguments in turn.

Appellant asserts in his petition that the presiding official erred in sustaining his removal when the agency had denied him the full 7 days to reply to his removal proposal notice in contravention of 5 U.S.C. § 7513(b)(2). The Board held in Baracco v. Department of Transportation, MSPB Docket No. DC075281F0895 at 17 (April 25, 1983), that the procedural error of an agency in failing to afford an employee "not less than 7 days" to respond to a written proposal of an appealable adverse action, as required by 5 U.S.C. § 7513(b)(2), does not warrant reversal of the action unless the appellant shows by a preponderance of the evidence that the procedural error likely had a harmful effect upon the outcome of the adverse action before the agency. See 5 C.F.R. § 1201.56(c)(3). See also Parker v. Defense Logistics Agency, 1 MSPB 489, 492-93 (1980). Applying that standard to the facts of this case, the Board agrees with the presiding official that appellant did not establish his affirmative defense of harmful error in this regard because appellant was able to respond by requesting more information. He submitted this request, one other letter, and a Freedom of Information Act request to the agency. If he could submit these requests to the agency he certainly could have responded to the proposed notice of removal. Furthermore, appellant did not establish harmful error because he did not indicate how the response to the

proposal notice would have differed had he been given more time to reply.

Appellant next asserts in his petition that the presiding official erred in finding that the agency established a prima facie case of his participation in the strike. In Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 at 6 n.2 (October 28, 1982), the Board held that where the existence of a strike is a matter of general knowledge, the agency may establish a prima facie case of an appellant's participation in the strike by presenting evidence of his unauthorized absence from duty during the strike. We held, further, that once the agency establishes its prima facie case, the burden of going forward shifts to the appellant to rebut the agency's case by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than voluntary participation in the strike. Id. The agency nonetheless retains its ultimate burden of establishing the appellant's participation by preponderant evidence under 5 U.S.C. §7701(c)(1)(B). Id.

In this case, the presiding official found the agency established by preponderant evidence that a strike by air traffic controllers was a matter of general knowledge during the time period in question, see Ketchem v. Department of Transportation, MSPB Docket No. DA075281F0713 at 4 (May 28, 1982), and that appellant was absent without leave during that period. Appellant presented no evidence to rebut this prima facie case. We find, therefore, that the presiding official did not err in concluding that the agency had established a prima facie case of the appellant's strike participation.

The appellant also contends in his petition that he was denied a meaningful opportunity for oral and written replies to his removal proposal notice as the result of the so-called

"command influence" of high level agency officials, as well as written instructions from agency headquarters to individual agency facilities on the handling of removal actions based on strike participation charges. The Board considered that contention in Anderson v. Department of Transportation, MSPB Docket No. SL075281F0347 at 8-13 (April 25, 1983), and found it meritless.

We concluded in Anderson that neither the public statements of President Reagan and high level agency officials regarding the strike, nor the written communications from agency headquarters to the various facilities, impinged on the ability of agency deciding officials to exercise independent judgment in determining whether the charges in individual cases should be sustained, and that such activity in no way deprived the appellants of a meaningful opportunity to reply to the charges on which their removals were based. The appellant in the case now before us has not established a significant distinction in support of a different finding here.

In its petition for review, the agency asserts that the presiding official erred in finding that it suspended appellant during his removal notice period when it maintained him in a nonduty, nonpay status from the date of his removal proposal notice until the effective date of his removal. The Board held in Martel v. Department of Transportation, MSPB Docket No. BN075281F0558 at 6-7, 11-12 (April 25, 1983), that in order to meet his burden of establishing jurisdiction over an alleged suspension during the notice period under 5 C.F.R §1201.56(a)(2), an appellant must prove by preponderant evidence that the action was involuntary and disciplinary in nature, and that the employee was ready, willing, and able to work during the period of time in question. The last of the three criteria cannot be established without evidence that the appellant contacted

an agency official with decision-making authority, in person or otherwise, and unequivocally notified the official that he was ready, willing, and able to return to work. Id. at 11. Such a showing effectively establishes, without additional evidence, that the agency's action or inaction in continuing to maintain appellant in a nonduty, nonpay status during the notice period was involuntary on appellant's part and disciplinary in nature on the agency's part. Id. at 12. Appellant failed to present evidence, either at the hearing or on review, establishing that he contacted an agency official with decision-making authority for the purpose of notifying the official that he was ready, willing, and able to return to work.

Thus, we find that the presiding official erred by ordering the agency to amend its records to show the appellant in a nonduty with pay status from August 7-20, 1981.

Accordingly, having fully considered the petitions for review in this case, the Board hereby DENIES appellant's petition for review for failure to meet the criteria for review set forth at 5 C.F.R. §1201.115. The Board hereby GRANTS the agency's petition for review and REVERSES that part of the initial decision ordering the agency to retroactively place the appellant in a nonduty with pay status between August 7 and August 20, 1981.

This is the final order of the Merit Systems Protection Board in this appeal.

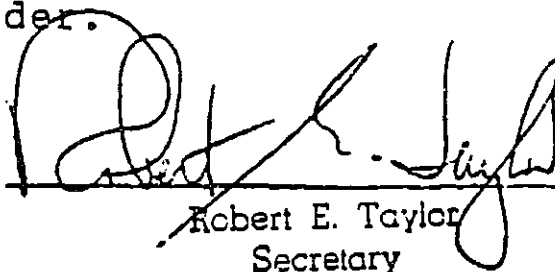
Appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

JUL 28 1983

(Date)

Washington, D.C.


Robert E. Taylor
Secretary